

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

BRENDA PHILPOT ELLIS,

Petitioner-Appellee,

v

FAMILY INDEPENDENCE AGENCY and  
CIVIL SERVICE COMMISSION,

Respondents-Appellants.

---

UNPUBLISHED

October 11, 2002

No. 225090

Wayne Circuit Court

LC No. 99-925350-AA

Before: White, P.J., and Neff and Jansen., JJ.

PER CURIAM.

Respondents appeal by leave granted a circuit court order reversing a final decision of the Civil Service Commission (CSC) and affirming a grievance hearing officer's recommended decision. We reverse.

I

Petitioner, a black female, was employed as a special assistant to the Director of the Contract Management Unit with the Wayne County FIA.<sup>1</sup> She interviewed for a Departmental Manager VIII position in June 1995 before a panel of three black males, but the hiring process was aborted and the position was not filled. Petitioner later learned that she was the top-ranked candidate in the interviews and was selected as the preferred candidate for the position by the hiring supervisor, James Kiner.

Petitioner filed a grievance alleging discrimination and violation of Civil Service rules. Following a hearing, the grievance hearing officer found petitioner entitled to a promotion and back pay. The hearing officer concluded that the failure to hire petitioner violated the constitution, 1963 Const art 11, § 5, and Civil Service Rule 1-1, which require that classified service positions be based exclusively on "merit, efficiency and fitness."

The FIA appealed the grievance decision to the Employment Relations Board (ERB), which reversed the decision of the hearing officer. The ERB found no violation of Civil Service

---

<sup>1</sup> Formerly known as the Department of Social Services (DSS).

merit principles because the record contained “more than adequate” reasons for the decision to conduct a second round of interviews, given that “there was no unanimous choice, the high scorer led by only .07, and the spread between the five top candidates was only 2.41 points.”<sup>2</sup> Following a review, the CSC adopted the ERB decision as the final decision.

In August 1999, petitioner filed a petition for review of the CSC decision in the circuit court. Following oral argument, the court reversed the CSC decision, finding that it was not supported by competent, material and substantial evidence. The court reinstated the hearing officer’s decision awarding petitioner a promotion and back pay.

## II

Respondents argue that the circuit court’s reversal of the final agency decision was improper. Further, even if the reversal was proper, the circuit court cannot properly award petitioner a promotion and back pay as a remedy.

“[W]hen reviewing a lower court’s review of agency action this Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency’s factual findings.” *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). The latter standard is indistinguishable from the clearly erroneous standard. *Id.*

The circuit court found that the CSC’s decision was not supported by competent, material and substantial evidence, stating: “the record reflects that the FIA’s essential abandonment of the selection process after placing petitioner as the top candidate was contrary to the fundamental principles guiding the process as delineated in Const 1963, art 11, § 5 and the Civil Service Commission rules.” We conclude that the court misapprehended and grossly misapplied the substantial evidence test. The court did not consider whether the CSC’s factual findings were supported by competent, material and substantial evidence. The court in essence adopted the conclusion of the hearing officer, which presents a mixed question of law and fact and is not properly determined by the substantial evidence test.

The CSC adopted the ERB decision, which concluded, with regard to the alleged merit principles violation:

The Hearing Officer’s further conclusion, that it was a violation of Civil Service Merit Principles when Carnegie, Kiner’s superior, did not defer to Kiner’s selection, is similarly flawed. The record contains more than adequate reasons for the decision to conduct a second round of interviews including the fact there was no unanimous choice, the high scorer led by only .07, and the spread between the five top candidates was only 2.41 points.

---

<sup>2</sup> The ERB further found no evidence of discrimination because contrary to petitioner’s allegation that she was not hired because she was a black female, the second ranked candidate for the position was also a black female. This finding is not at issue on appeal.

The circuit court was required to uphold the CSC's decision unless it was not authorized by law or was not supported by competent, material and substantial evidence on the whole record. *Boyd, supra* at 232. Petitioner argued, and the circuit court agreed, that the FIA's decision to abort the hiring process was a violation of the Constitution, 1963 Const, art 11, § 5, and CSC rules, as determined by the hearing officer. A plain reading of the cited authority does not support such an interpretation. The Constitution, 1963 Const, art 11, § 5, provides, in relevant part:

The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, *determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualification of all candidates for positions in the classified service, ....* [Emphasis added.]

The applicable Civil Service rule, Rule 1-1, provided:<sup>3</sup>

All appointments and promotions to positions in the classified service, and all measures for the control and regulation of employment in such positions, and separation therefrom, shall be based on merit, efficiency, and fitness.

This is not a case where qualification for an appointment or promotion was not based on merit, efficiency and fitness. No appointment was made. The Department Manager position apparently remained unfilled through 1996 and ultimately was filled by the lateral transfer of another department manager. Even if the Constitution or the CSC Rule could be interpreted to legally require that petitioner be hired following the interview results, such an interpretation is a question of law, not one of fact governed by the substantial evidence test. We find no basis in 1963 Const, art 11, § 5, or CSC Rule 1-1 to conclude that the failure to hire anyone for a position violates the law.

Even disregarding the question of law, we conclude that petitioner's claim fails. The question before the circuit court was whether the CSC's factual findings were based on competent, material and substantial evidence on the whole record. Given the substantial evidence standard, the circuit court clearly erred in reversing the CSC decision.

In its decision, the CSC concluded:

The record contains more than adequate reasons for the decision to conduct a second round of interviews including the fact there was no unanimous choice, the high scorer led by only .07, and the spread between the five top candidates was only 2.41 points.

---

<sup>3</sup> This rule has since been amended. The amendment does not affect the substantive issues on appeal.

It is undisputed, and documentary evidence shows, that 1) there was no unanimous choice, 2) the high scorer led by only .07, and 3) the spread between the five top candidates was only 2.41 points. Further, OHR Director Harris testified, and much of the documentary evidence supported, that he objected to the hiring process and decided to abort the process on the basis of several factors. Harris testified, and the memos between Kiner and Carnegie supported, that OHR was concerned that interview panel lacked diversity from an affirmative action standpoint. Kiner testified, and it was undisputed, that diversity was an issue to OHR even before the interviews were conducted. Harris' testimony established that, contrary to the usual procedure, the interviews did not include an OHR monitor to ensure equity from interview to interview. Harris testified that the breach of the confidentiality of the interview results was a deciding factor in aborting the hiring process.

The testimony and evidence meets the substantial evidence standard for upholding the CSC's factual findings. Substantial evidence is that which a reasonable mind would accept as sufficient to support a decision. *In re Payne*, 444 Mich 679, 692 (Boyle, J.), 698 (Riley, J.); 514 NW2d 121 (1994). Substantial evidence is more than a mere scintilla but less than a preponderance of the evidence. *Id.* The circuit court clearly erred in reversing the decision of the CSC given the evidence. *Boyd, supra* at 234-235.

To the extent that the CSC's final agency decision hinges on issues of credibility, some deference is given to the findings of the hearing officer as the initial factfinder. Evidence supporting an agency's conclusion may be less substantial when an impartial hearing officer, who has heard the testimony, draws conclusions different from those of the final agency decision. *MERC v Detroit Symphony Orchestra, Inc.*, 393 Mich 116, 127; 223 NW2d 283 (1974). The significance of the examiner's findings depends largely on the importance of credibility in the particular case. *Id.*

In this case, the hearing officer found the agency's reasons for not filling the position spurious, presumably to some extent based on an assessment of OHR Director Harris' credibility. Nonetheless, the findings of the hearing officer are not so significant that they override the conclusion that the CSC's decision was supported by competent, material and substantial evidence on the whole record. When there is substantial evidence, a reviewing court must not substitute its discretion for that of the agency even if the court might have reached a different result. *Black v Dep't of Social Services*, 195 Mich App 27, 30; 489 NW2d 493 (1992). A court may not set aside findings merely because alternative findings also could have been supported by substantial evidence on the record. *Payne, supra* at 692 (Boyle, J.), 698 (Riley, J.).

Having concluded that the circuit court clearly erred in reversing the CSC's decision, we need not address respondents' remaining issue whether the remedy of ordering a promotion and back pay is proper.

Reversed.

/s/ Janet T. Neff  
/s/ Kathleen Jansen